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CURRENT TOPICS.

Says a late number of the *Solicitor's Journal*, in commenting upon an abuse which seems to be common to both countries: "In connection with the recent well-meant attempt of the jurors, or some of them, to procure the pardon of a convict by a disclosure of the secrets of the jury-box, it may be well to point out that the law very much discourages any disclosure of the kind. In the case of grand jurors, the oath is to keep secret 'the Queen's counsel, his fellows, and his own,' and it was at one time felony in a grand juror to disclose the King's counsel. 27 Ass. pl. 63. Petty jurors take no such oath, but it is clear that the spirit of the law is against disclosure. In civil cases their evidence is not receivable to prove their own misbehavior, or to prove that a verdict which they delivered was given through mistake (Best on Evidence, citing Straker v. Graham, 4 M. & W. 721, and other cases), for, it is said, 'The allowing a juryman to prove the real or pretended misbehavior or mistake of himself or his companions would open a wide door to fraud and malpractice in cases where it is sought to impeach verdicts.' In the United States it appears that the rule is generally the same, that the testimony of a juror is inadmissible to impeach a verdict. Read v. Commonwealth, 22 Gratt. 924; Commonwealth v. Drew, 4 Mass. 391. In Tennessee, however, the English rule appears to be rejected altogether (Crawford v. State, 2 Yerg. 60), and in one or two other States "the affidavits of jurors will sometimes be received for the purpose of explaining, correcting, or enforcing a verdict.' Dana v. Tucker, 4 Johns. 487. In Iowa they have even been admitted to prove a decision by lot (Wright v. Illinois Telegraph Company, 20 Iowa, 19), and that the instructions of the court were misunderstood. Pickard v. United States, 1 Iowa, 225. We have been unable to discover any authorities as to criminal cases in this country, but we make no doubt that the recommendation to mercy is the only recognized mode by which a juryman can qualify the judgment of the court which follows upon the verdict which he is sworn to give."

In a recent Iowa divorce case (Kline v. Kline) involving the custody of minor non-resident children, ROTHROCK, J., after premising that, the rule that the domicil of the wife follows the domicil of the husband, must, from the nature of the action and the antagonism of the parties, be relaxed in such cases; and that the extra-territorial force of the decree must be confined to the *status* of the parties, says: "Suppose that a husband should desert his wife and remove to another State, taking his property with him, and she should make her application for a divorce and alimony, and make service by publication, an take her decree without any appearance by the defendant,—no one would claim that a money judgment for alimony could be enforced in such case in a foreign jurisdiction. And yet, in a certain sense, the court has jurisdiction of the defendant; but it is only for the purpose of changing the *status* of the complaining party and terminating the marriage. We think it logically follows, that where the minor children are non-residents of the State where the divorce proceedings are had, that the court acquires no jurisdiction as to their custody, simply because the decree can have no extra-territorial force or effect. In Cooley on Const. Lim. 404, it is said: 'The publication which is permitted by the statute is sufficient to justify a decree in those cases changing the *status* of the complaining party, and thereby terminating the marriage; and it might be sufficient, also, to empower the court to pass upon the question of the custody of the children of the marriage, if they were within the jurisdiction. If they acquire a domicil in another State or country, the judicial tribunals of that State or country would have authority to determine the question of their guardianship there.' * * * In our opinion the decree, so far as is attempted to fix the custody of the children, was without jurisdiction in the first instance. Want of jurisdiction is a matter which may always be interposed against an adjudication, when sought to be enforced, or when any benefit is claimed for it. The want of jurisdiction, either of the subject-matter or of the person of either party, renders a judgment a mere nullity."

TELEGRAMS AS EVIDENCE.

The application of known ancient principles of the Common Law to the telegraph, has given rise to some novel questions of practical import, of which those relating to the use of telegrams in evidence are not the least interesting. Telegrams may be either written or verbal. The message delivered to the operator by the sender may or may not be reduced to writing. The same is true of the message secured at the other end of the line. When the original message is written it is classed as a private writing, and is governed by the same law as to primary and secondary evidence as other private writings. The original must be produced in evidence, or its absence properly accounted for. "Telegraphic messages are instruments of evidence for various purposes, and are governed by the same general rules which are applied to other writings. If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry as to which is the original.[1] The most important inquiry relates to the original. What is the original message? We apprehend that there is a widespread impression that in all cases the message signed by the sender, and delivered for transmission, is the original; an impression which has justification in a casual reading of the latest text-book on evidence.[2] This is undoubtedly the rule of the English cases which are based upon some supposed and fanciful distinction drawn from the public nature of the telegraphic business.[3]

In almost the first American case on the subject, Redfield, C. J., establishes the correct rule. "In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the transmission across the line, or, in other words, whose agent the telegraph is. The first communication in a transaction if it is all negotiated across the wires, will be only effective in the form in which it reaches its destination. In such case inquiry should be made for the very dispatch delivered."[4] Twenty years afterwards he sees no reason to change his view, and reaffirms it in much the same language.[5] Writing later still in the *American Law Register*,[6] he says: "The early doctrine maintained in this country was, that the party initiating the negotiation was responsible for the correct transmission of his message, whether an offer or an inquiry, and that he was bound by it in the terms in which it was delivered to the party addressed.[7] But the doctrine," he adds, "of this case has not been universally followed either in this country or England." He speaks in the same article of "the preponderance of authority" against this view. We submit that it is fully established, both by principle and authority. The reasons which seem satisfactory to us are: 1. The company is the agent of the party benefitted, and responsible for the transmission of the message. The same is true of common carriers whose undertaking is presumed to be in favor of the party interested. If the consignor is responsible for the delivery of the goods sent, the carrier becomes his agent.[8] If the telegraph company is his agent, then it is but reason that he should be responsible for the message as delivered, not merely for the instruction given. There is no privity of contract or agency between the sender and the company. If he is damaged he must sue in tort. 2. It is a universal rule that when one employs an agent, though he exercise but a special and limited authority as to transmit an order on a mercantile house, the principal is bound to take every reasonable precaution to employ a competent person, and have him properly instructed. By taking the proper precaution in the transmission of a telegram, by securing a skilful operator, and having the message repeated back, all dangers of error may be eliminated. Being the party in fault, if there is an error in the delivery, he ought to bear the consequences.

[1] Hawley v. Whipple, 48 N. H. 488; Durkee v. Vermont, etc. R. Co., 29 Vt. 140; Scott & Jarnagin on Tel., sec. 345.

[2] Whart. on Ev., sec. 1128.

[3] 12 Cent. L. J., 366; Henkel v. Pape, 40 L. J. Exch. 15; Playford v. Union, etc. Tel. Co., 4 Q. B. 706; McBlair v. Cross, 25 L. T. (N. S.) 804; Godwin v. Francis, 39 L. J. (C. P.) 121.

[4] Durkee v. Vermont, etc. R. Co., 29 Vt. 140.

[5] Redfield on Carriers, 400.

[6] 4 Am. L. Reg. (N. S.), 402.

[7] Durkee v. Vermont, etc. R. Co., 29 Vt. 140.

[8] Hooper v. Chicago, etc. R. Co., 27 Wis. 81; Dutton v. Solomonson, 3 B. & P. 581; Jacobs v. Nelson, 3 Taunt. 428.

The message as delivered ought to be the primary evidence of what he meant. 3. Where one uses the mail for remitting, he is responsible for any loss or mistake, unless there is a different arrangement.[9] 4. Where public agents, as factors and brokers, are employed, though really under limited authority as to the world generally, they exercise a general authority. The same rule ought not to be applicable to telegraph companies when they exceed or misapprehend their instructions in transmitting messages.[10] If the precedents are examined with care and discrimination they not only do not show "a preponderance of authority against this view," but present no serious conflict. In some of the cases there are, it is true, some inconsiderate expressions of opinion from which such a conflict might be inferred, but they form no essential part of the decision. They are so few that we may notice them individually. In Williams v. Brickell,[11] the sender of the telegram was the defendant; over his objection a witness was allowed to state the contents of the message received at the end of the line. There was no discussion as to which was the original message. Held, "that the court erred in permitting secondary evidence of the dispatch." The company was sued in Kinghorne v. Montreal Tel. Co.,[12] for damages for not delivering a message, an answer to one containing an offer. The defense was "no damage," because if the message had been delivered it would not have made a contract, it being impossible to make a valid contract over the wires. The decision was solely to the effect that where a contract is attempted to be made through the medium of the telegraph, "if that can be done at all" (*sic*), the message signed by the parties must be produced, and not the transcript from the wires. The language of the court in Matteson v. Noyes,[13] is certainly very sweeping: "The paper filed at the office from which the message is sent, is, of course, the original, and that which is received purports to be a copy." It thus ignores the relation between the sender, the sendee and the company. The report is so meagre in its statement of facts as to render it valueless as an authority. The paper introduced purported to be a telegram from appellant to one Darling, but for whose benefit it was sent, what its contents, or what the purpose for which it was offered, the report does not show. If it was ever entitled to any weight as an authority, it was expressly overruled in Morgan v. People.[14] The case of Dummings v. Robert,[15] does not bear on this rule, as has been erroneously supposed. It tends to support it. For it holds that where there is a mistake in the message as delivered, the sender for whose benefit it was sent, and who was responsible for its transmission, was bound by it as delivered, and not as sent. "By employing him (the operator) he warrants his competency and good conduct in all matters within the scope of his agency." The court permitted a copy to be read in evidence, on proof that due search had been made for the original. Whether it was "a copy" of the message sent or delivered is not apparent, but the inference is irresistible that it was a copy of the message actually delivered. Mr. Wharton, in his admirable treatise on Evidence,[16] says: "To charge a party with a telegram, the original message in the handwriting of the party must be produced." If this is intended as enunciating a general rule, it would be entitled to more consideration, did not the very next sentence state the true doctrine: "The telegram, as delivered and acted upon by the receiver, becomes the primary evidence of the contract," and did not the very cases cited sustain the contrary view. The author's language must be given a special limited significance. Otherwise we have the anomaly of so learned and accurate a writer being guilty of both an error and a palpable inconsistency.

This disposes of all the authorities which can be cited as adverse. There is nothing in them to impair the force of the rule of Durkee v. Vermont C. R. Co. The other precedents on the subject unqualifiedly affirm it.[17]

[9] Lane v. Colton, 1 Ld. Raym. 646.

[10] Fearn v. Harrison, 3 Term. R. 757; Whitehead v. Trickett, 15 East. 408; Pickering v. Busk, 15 East. 38,43; Johnson v. Jones, 4 Barb. 369; Story on Agency, secs. 110, 208, 225, 227.

[11] 37 Miss. 682.

[12] 18 U. Can. (Q. B.) 60.

[13] 25 Ill. 592 (1861).

[14] *Supra*.

[15] 35 Barb. 471 (1862).

[16] Sec. 1128.

[17] Saveland v. Green, 40 Wis. 440; Trevor v. Wood

Our space will not permit of a review of all the cases, but Saveland v. Green,[18] on a contract of affreightment is very pointed, and may be specially referred to. Defendant, at Buffalo, sent a telegram to plaintiff at Milwaukee, seeking to charter the latter's vessel. The court was asked to determine which was the original of the message. It concludes a review of the subject: "The telegraph company was the agent of the defendant for the transmission of the message, and the message received by the plaintiff is the original, and properly received in evidence in the case." It has been said that the message delivered across the wires is not signed by the sender, and purports to be a copy.[19] If one signs, in the presence and by the instructions of another, his signature, this is sufficient signing to satisfy the statute of frauds. In sending a telegram, the manipulation by which the sender's name becomes appended to the message delivered is as good as a personal signature. Adopting the expressive language of Howley v. Whipple,[20] "it makes no difference whether the operator writes the acceptance in the presence of his principal or by his express direction with a steel pen an inch long attached to an ordinary penholder, or whether the pen be a copper wire one thousand miles long."[21]

It is equally true that the message received is not always the original. For if it is a mere answer, without any new conditions, or is sent at the request or for the benefit of the recipient, the original is the message delivered for transmission.[22] When the contents of any particular paper are in controversy, the paper itself is the primary evidence. So, where one sues a company for not correctly transmitting or neglect to transmit a message, the paper delivered to be transmitted must be produced. It is the exclusive test of accuracy and of the rate of compensation.[23] It is a well-established rule of evidence that the mailing of a letter properly stamped and addressed to a person at his regular post-office, where he is known to reside, or to do business, is evidence tending to show the reception of the letter by the person addressed.[24] The like presumption of regularity is applicable to the telegraph. Proof that a message was sent over the wires addressed to one by name where he resides, or does business, is evidence tending to show its reception by the party addressed.[25] In Connecticut v. Brodish,[26] a letter was admitted against one when there was no other evidence of the handwriting than that it was received in reply to a letter addressed through the post-office to him. This ruling has been since fully sustained.[27] Sargent, J., refused to extend the analogy to telegrams.[28] We can not see any distinction between the two cases, and prefer to follow the sounder doctrine of Taylor v. Campbell,[29] and Jeffries v. Commonwealth.[30] The language of Bigelow, C. J., in the latter case, on this use of telegrams, is very pertinent: "No rule of evidence is better settled or more clearly founded in good sense and sound policy, than that which authorizes presumptions or inferences of fact to be deduced from the proof of certain other facts which, according to the common experience of mankind, or the usua course of business, naturally or necessarily leads to the result or conclusion sought to be drawn from them." Campbell v. Taylor was very similar in its facts to Howley v. Whipple. It was an action against a steamboat for the non-performance of a contract of affreightment. The plaintiff proved that he sent a dispatch to the master of the boat, and received an answer by wire purporting to come from him. This was sufficient to permit the dispatch to be read against him. "If, under such circumstances, any person had received a dispatch in answer to one forwarded by him, he would not have failed to

36 N. Y. 307; Dunning v. Roberts, 35 Barb. 463; State v. Hopkins, 50 Vt. 316; Scott & Jarnagin on Telegraph, sec. 345; Redfield on Carriers, p. 400; Wharton on Evidence, secs. 76 & 112.

18 *Supra.*

19 Matteson v. Noyes, 25 Ill. 60.

20 48 N. H. 487.

21 12 Cent. L. J. 366; Dunning v. Roberts, 35 Barb. 463.

22 Redfield on Carriers, 400.

23 Scott & Jarnagin on Telegraph, sec. 345

24 Dana v. Kemble, 19 Pick. 113; Taunn v. Hughes, 33 Pa. St. 290; United States v. Babcock, 3 Dill. C. C. 573; Commonwealth v. Jeffries, 7 Allen, 548; Oaks v. Webster, 16 Vt. 63.

25 Commonwealth v. Jeffries, 7 Allen, 548; United States v. Babcock, 3 Dillon, C. C. 575; Wharton on Evidence, sec. 76.

26 14 Mass. 296.

27 Greenleaf on Evidence, and cases cited, sec. 578.

28 Howley v. Whipple, 48 N. H. 489.

29 20 Mo. 260.

30 *Supra.*

act upon it. His conduct would have been based upon the faith usually given to the correctness and fidelity with which such business is transacted by the agents of the telegraph."

Telegrams from the defendant to a third person, in regard to plaintiff's arrest, are admitted as a part of the *res gestae* to connect defendant with the arrest.[31]

It is a duty which telegraphic companies owe to the public, not to divulge the contents of private telegrams. The duty is enforced in most of the States by statute.[32] These statutes, however, are not construed so as to exempt their servants and agents from the obligation to produce them in court in obedience to judicial process.[33] *Semble*, that admission of the telegram by the party sought to be charged, dispenses with notice to produce the original at the trial.[34] And where the original is out of the jurisdiction of the court, parol evidence of its contents is admissible.[35] The proper mode of putting a telegram in evidence, where the sender is the one initiating the correspondence, either making a propsition or an inquiry, is easily deducible from what has been said. The message actually received is the original. The two messages are not duplicate originals.[36] The original must be produced or its absence accounted for. If it is in the possession of the adverse party, notice must be given to produce it. If it is in the hands of a third party, a subpœna *duces tecum* will lie.[37] If the message is introduced against the sender, it may be shown that it purports to come from him and was delivered by the regular messenger of the company. It might be supplemented by proof that it came over the wires. This ought not to be necessary ordinarily, as the company being the agent of the sender, the message is binding on him as delivered. We do not understand the case of Richie v. Bass[38] to be opposed to this. For there "no proof that the paper produced was in the handwriting of any person employed in the office at the time it purports to have been received; neither is its authenticity established in any other manner." Its authenticity would have been established by proof that it was delivered by a regular messenger or agent of the company. As the same presumption of regularity is applicable to telegraphic communications as to those through the post-office, this evidence would be subject to rebuttal, but not by evidence that the operator made a mistake in transmitting the message. The company being his agent, the sender is responsible for its correct transmission. If the message is sought to be proved as against the party to whom it was sent, the message delivered, with proof of its receipt, is the best evidence. If it can not be had, and its absence is properly accounted for, parol evidence may be produced. In such case, if it is shown that the message was given to the sending operator who sent it over the wires, this would be evidence tending to show that it was received by the party to whom it was addressed.[39] It might be well to have a subpœna *duces tecum* directed to the agent to produce the records of the message kept by the company. However useful in some cases as memoranda to supplement proof in the absence of other evidence, may be the original instructions in writing given to the transmitting operator, and the records of the message made by the company, they are in no case a *sine qua non*. Unless, perhaps, we adopt the opinion which we think untenable, that there are grades of secondary evidence. In that case, the next best evidence would be the message delivered at the first end of the line, and then the records of the company of the message actually received across the wires and delivered.[40]

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[31] Cheesman v. Carrey, 33 Ark. 316; State v. Hopkins, 50 Vt. 316.

[32] Wagner's Stats. of Mo., p. 507, sec. 51; p. 325, sec. 13.

[33] Henster v. Freedman, 2 Parson's Sel. Cas. Law, 274; 3 Cent. L. J. 427; 8 Cent. L. J. 378; 10 Cent L. J. 130; 10 Am. L. Reg. (N. S.) 376; Wharton on Evidence, secs. 1112 & 1595; *In re* Waddell, 8 Jur. (N. S.) 181; *In re* Ince., Law T. (N. S.) 421; *Ex parte* Brown, 7 Mo. App. 493; S. C. in Sup. Ct. Mo., 11 Cent. L. J. 491. *Per contra*, Cooley Const. Lim., 307.

[34] Williams v. Brickell, 37 Miss. 682; Wharton on Evidence, sec. 1091.

[35] Brown v. Wood, 19 Mo. 475.

[36] Scott & Jarnagin on Telegraph, sec. 368.

[37] For requirements of the writ, see *Ex parte* Brown, 11 Cent. L. J. 491.

[38] 15 La. Ann. 668.

[39] United States v. Babcock, and Commonwealth v. Jeffries, *supra*.

[40] 11 Cent. L. J. 491.

DOES STIPULATION FOR ATTORNEY'S FEE RENDER A PROMISSORY NOTE NON-NEGOTIABLE?

In the article of E. G. Taylor, on this subject, in the issue of February 3, commenting on the decision of the Missouri Supreme Court in the case of First National Bank of Trenton v. Gay,[1] is contained a statement of the writer that he knows of but one State holding a similar view—Pennsylvania. It occurred to me on reading this, that there are more States than Pennsylvania and Missouri holding to the doctrine that a stipulation in a promissory note to pay attorney's fees destroys its negotiability, or renders it subject to the same defense in an indorsee's hands as in the original payee's. I do not assume to have examined the decisions carefully, or to express any opinion on the question as an original proposition; I only ask a limited space to name a few of the decisions Mr. Taylor seems to have overlooked, which sustain the Pennsylvania and Missouri view.

In Jones v. Radatz, decided by the Supreme Court of Minnesota,[2] the plaintiff, claiming to be a *bona fide* holder, brought suit upon an instrument in the following form:

P. O. St. Paul, County of Ramsey,
State of Minnesota, Sep. 7, 1878.

"$135.

"Three months after date, we, or either of us, promise to pay to H. K. White & Co., or bearer, $135, payable at the Second National Bank of St. Paul, Minnesota, for value received, with twelve per cent. interest per annum, from date, and reasonable attorney's fees, if suit be instituted for the collection of this note." (Signed.)

The defendants alleged that the execution of the instrument was procured through fraud. The evidence was admitted, and secured a verdict of the jury for defendants. The admissibility of this defense as against plaintiff, a purchase before maturity for value, and without notice, was the question before the court; was the instrument a negotiable promissory note? The court, opinion by Gilfillan, C. J., briefly examine the Iowa, Kansas and Kentucky cases, and then pronounced against them, holding the instrument non-negotiable for uncertainty. "We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and that any provision which, before that time, removes such certainty, prevents the instrument being negotiable at all. The stipulation in this instrument for payment of reasonable attorney's fees, introduced into the obligation an element of uncertainty which prevented the instrument being a negotiable note." This opinion seems to have been adhered to by the Minnesota court since.[3]

In the case of Dow v. Updike,[4] decided by the Nebraska Supreme Court, opinion by Maxwell, C. J., the action was brought upon the note by the payees named therein. The language of the instrument, following the form of an ordinary negotiable promissory note, was: "And if I fail to pay this note, or any part thereof, when due, I promise to pay the holder thereof, in addition to the above-named amount mentioned in this note, and at its maturity, reasonable attorney's fee for instituting and prosecuting to judgment a suit on this note. The cause of action was set out in two counts, the first for $250 and interest, the amount named in the note proper, the second for $25 as reasonable attorney's fees. A demurrer was interposed to the second count, overruled, and a judgment rendered for plaintiffs for face of the note and interest, and $25 attorney's fee. The defendant appealed. The Supreme Court held the contract for attorney's fee usurious and void, reverse the decision of the district court, and sustain the demurrer.[5] In an earlier Nebraska case,[6] it was held that an instrument containing an attorney's fee clause, with a statement of the consideration for which the note was given, was negotiable; but the argument and opinion seem only to have been directed to the lengthy clause in the note stating consideration, and not to the at-

[1] 63 Mo. 33.

[2] Opinion filed October 7, 1880. See 6 N. W. Reporter, 800.

[3] See Third National Bank v. Armstrong, 25 Minn 531; and Stevens v. Johnson, 9 N. W. Reporter, 677, though other elements were here involved.

[4] Filed January 12, 1881; 7 N. W. Reporter, 857.

[5] The court cites and follows the decisions in Ohio: State v. Taylor, 10 Ohio, 378; Bank of Wooster v. Stevens, 1 Ohio St. 233; and a Virginia case, Toole v. Stevens, 4 Leigh, 581.

[6] Newton Wagon Co. v. Dier, 10 Neb. 284.

torney's fee clause—"and if this note, or any part of it, is collected by suit, to pay reasonable attorney fees."

Although the case of Gaar v. Louisville Banking Co.,[7] is cited in the Minnesota decision as advancing the proposition that a stipulation for reasonable attorney's fee does not impair the negotiability of the note, yet I find that in the case of Witherspoon v. Musselman,[8] a stipulation: "If the note is collected by suit, we are to pay a reasonable attorney's fee"—held to be against public policy and void.[9]

The Supreme Court of Dakota has passed upon the question so far as to sustain the validity of a provision stipulating for a sum certain for attorney's fees in case of suit brought,[10] and cite approvingly the Indiana, Illinois, Iowa and Louisiana cases, grounding their decision, however, on a provision of the statute; "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impractical or extremely difficult to fix the actual damage." Shannon, C. J., dissented, but filed no opinion. There does not seem to have been any defense interposed whereby the question of negotiability arose, the defendant relying on a plea that the note was usurious and void. I shall be glad to see a case arise brought by an innocent purchaser, and a defense of fraud or the like pleaded, and what opinion the court will then express in view of two sections of the civil code. "A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment;"[11] and, "A negotiable instrument must not contain any other contract than such as is specified in this article"[12]—the article nowhere providing for attorney's fees. The Code of Civil Procedure provides: "When, by the terms of any written instrument, it appears that the debtor has made a written contract for the allowance of attorney's fees, the same must be allowed by the court in conformity to the instrument, and must form a part of the judgment and be incorporated therein."[13] This is between the parties, but leaves still open the question of the negotiability of such instruments.

This is comparatively a new question, and the decisions directly bearing on it are recent. Mr. Daniel, in his excellent work on Negotiable Instruments, examines it briefly,[14] and cites in foot notes the principal decisions sustaining the negotiability of instruments of the character mentioned, referring also to the Pennsylvania and Missouri cases holding adversely. But there remains more to be said, and further citations to be made. Can not some one who has the time and access to large libraries make an examination of the subject and report?

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[7] 11 Bush, 180.
[8] 14 Bush, 214, cited in United States Digest, vol. X, p. 87.
[9] To the same effect see, Myer v. Heart, 40 Mich. 517; Bullock v. Taylor, 39 Mich. 137.
[10] Farmers' National Bank v. Rasmussen, 1 Dakota, 60.
[11] Sec. 1822.
[12] Sec. 1827.
[13] Sec. 378.
[14] Pp. 54, 55, vol. 1.

PROFESSIONAL ETHICS; SHOULD A LAWYER PRACTICE IN A COURT IN WHICH THE JUDGE IS HIS NEAR KINSMAN?

This question has often been raised and discussed among members of the bar in this country, but not formally in court so as to evoke a judicial opinion. We have been hoping to learn the result of a recent case in England, where an objection is alleged to have been made to proceeding with the trial of a cause, on the ground that the presiding judge was a near kinsman of the attorney on the other side of the case. The objection was overruled, and the trial went on to a verdict, when a rule to show cause was taken; but we have not yet learned the result.

We are not aware of any statute having ever been enacted, either prohibiting or admitting such practice. If the spirit of the rules of the common law which apply to a party in a cause, were extended to the attorney of such party, no judge would, in such case, consent to hear a cause in which his son was an attorney of one of the parties, sooner than he would if his son was such

party himself. The theory of challenge, at common law, to the favor of a juror, allowed to a party in a cause, rests on the ground of a supposed infirmity of his nature, which can not overcome the bias of his feelings, caused by his great intimacy with, or interest in, the other party; an interest which may be only that of a strong personal friendship. It is out of regard to this weakness of human nature which allows an unconscious partiality for the case made by the friendly party, and an unconscious prejudice against the opposite side, with whom there is no corresponding sympathy, that this right of challenge is so wisely and universally recognized in legal proceedings.

It is because an attorney or counsel in a suit is, in theory, presumed to have no personal interest in the event of that suit, and that his fee is not contingent upon the result, that he is regarded as disinterested and unchallengable, though he may be of near kin to the judge presiding at the trial. And thus there is no recognized positive law which is held to exclude an attorney or counsel from appearing on the trial of a cause in his father's court. The objection to his appearing in such relation, if any, can only rest upon that natural bias of feeling and sympathy which a judge is supposed to entertain towards his own son or brother, or other near kinsman, who may have charge of a cause in his court —an interest which he is not supposed to have towards the opposite counsel who is not so related to him.

To illustrate the principle involved: Take the case of a young, struggliug lawyer who is retained in a suit involving, if he succeeds, a million of dollars to his client, and to himself an enormous fee, besides a reputation which is equivalent to a fortune. Brilliant success in a celebrated case has often lifted a lawyer from obscurity to eminence in his profession. Now place this young man with such a suit in a court in which his near kinsman—his father, for example, is the judge, and assume such judge to be a man of rare purity and honor in life—a model man. Yet he is not a model man if he is destitute of natural affection, or sympathy stronger than a mere bias for the success and upbuilding of the reputation and fortune of his own son. Is it not easy to see that in the trial of the cause, and in the charge to the jury, especially in arraying and commenting upon the testimony, the judge would likely be warped, quite unconsciously, and, it may be, with great subtlity, giving his official influence to secure a verdict favorable to the side which his son had espoused? In questions of pure law there is not so much danger from the partiality of the judge, because his rulings can be reviewed before a higher tribunal when his reputation will be involved. But in questions of fact at *nisi prius*, there is scope for a strong partiality without any corrective influence.

This disqualifying kinship is not confined to the relation of father and son. It is applicable to son-in-law, and to brother and brother-in-law, though perhaps in less degree.

A judge placed in such circumstances may be strong enough to disobey the feelings and affections of his nature, and may conduct the trial of the cause with absolute blindness to the parties and their counsel, and with indifference as to the result of the case, but if the efforts of his kinsman in court should be successful, there would naturally be clamor and scandal raised by the losing party and his sympathizers against the integrity and impartiality of the court, which would affect public opinion and impair public confidence in the judiciary.

It is to avoid even a suspicion of partiality that some judges of great delicacy of honor have been unwilling that their sons, or other near kinsmen should practice in their courts. Judge Roosevelt, of New York, twenty-five years ago, was an example in point, and no member of the New bar or bench was more respected for his fine sense of professional honor than he.

Another illustrious example among the members of the New York bar was found in James T. Brady, who was recognized as the soul of honor. When his brother, John R. Brady, became judge of the Common Pleas in the City of New York, James, solely because of his relationship to the judge, abstained from that time from all practice in his brother's court, though he was offered large fees to make motions in that court. At a meeting of the New York bar, to show respect to the memory of Mr. James T. Brady,

Luther R. Marsh, in the Court of Common Pleas, said:

"This particular court, as such, will not feel his loss as much as others; for since the accession of his brother to this bench, now some thirteen years ago, the voice of Mr. Brady, though often and earnestly implored, has never been heard at this tribunal. He, from that moment, withdrew entirely from practice in this forum, directly or indirectly, that the appearance might correspond with the reality; and no fee or tempting cause of popular interest could tempt him to swerve from the line of duty his delicate sense of honor prescribed—an ever conspicuous trait in his professional life."

At the Philadelphia bar we had an illustrious example in the United States District Court over which Judge Cadwallader presided for many years. His son, John Cadwallader, was an honorable member of that bar, but he never practiced in his father's court, although his business there would have been very remunerative on account of bankruptcy proceedings therein. The judge suggested to his son the propriety of his confining his practice to other courts; and during the entire judicial life of the judge, both he and his son adhered with scrupulous fidelity to this principle of professional delicacy and judicial ethics. And their conduct in this respect elicited the warmest commendation of the bar.

There are doubtless many other similar instances in the various States, which are not very generally known. And there are also, perhaps, many more cases of the other class, in which no regard is paid to the relationship of the attorney to the judge; or rather, such relationship is often the ground on which multiplied retainers are given to an attorney in the court of his father or near kinsman. These retainers are generally understood to be given, not because of his ability or experience, but simply because of his kindred relations to the court. His business increases; his briefs multiply; large corporations select him for counsel, though they already have older and superior men retained and depended upon.

It may be urged that judges are, and should be, above the suspicion of partiality or bias under all circumstances, without regard to personal friendship or natural affection so far as the members of the bar are concerned. Whether this is so or not, the lawyers do not assume it to be so, even in cases where the judge is of the most exalted character for honor and integrity. And if it were known how severely the practice is condemned by the bar and the public, and what scandal attaches to it in many cases, no judge who respects his office and his honor would subject them to such aspersions.

As this question has no statute or judicial case to determine it, and the practice in some courts is favored and in others disfavored, it seems to be left, in the absence of legislation, to the pleasure of the judges themselves, or to the nice sense of honor of the bar. The bar would admire the judge for closing his ear in his own court against his own son or near kinsman, and the public would coincide with the bar. It is better that any practice of doubtful propriety should be waived than adhered to.

JNO. F. HAGEMAN.

Princeton, N. J.

CRIMINAL LAW — MURDER — INTOXICATION AS AFFECTING PREMEDITATION —INSTRUCTIONS TO JURY.

HOPT v. PEOPLE.

Supreme Court of the United States, October Term, 1881.

1. Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation.

2. Under a statute which requires the instructions of the judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine.

In error to the Supreme Court of the Territory of Utah.

Mr. Justice GRAY delivered the opinion of the court:

The plaintiff in error was indicted, convicted and sentenced for the crime of murder in the first degree in the District court of the Third Judicial District of the Territory of Utah, and presente a bill of exceptions, which was allowed

presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence. he sued out a writ of error from this court. Of the various errors assigned, we have found it necessary to consider two only.

The Penal Code of Utah contains the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious or premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder in the second degree." Sec. 89. "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Sec. 90. Compiled Laws of Utah of 1876, pp. 585, 586. By the Utah Code of Criminal Procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally;" Sec. 257, cl. 7; the jury, upon retiring for deliberation, may take with them the written instructions given; Sec. 289; and "when written charges have been presented, given or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsement showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." Sec. 315. Laws of Utah of 1878, pp. 115, 421, 126.

It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide. The defendant's fifth request for instructions, which was indorsed "refused" by the judge, was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery or burglary. The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation, which, according as they are absent or present, determine the degree of the crime. Upon this subject the judge gave only the following written instructions: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime."

The instruction requested and refused, and the instruction given, being matter of record and subjects of appeal under the provisions of the Utah Code of Criminal Procedure, sec. 315, above quoted, their correctness is clearly open to consideration in this court. Young v. Martin, 8 Wall. 354.

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. United States v. Drew, 5 Mason, 28; United States v. McGlue, 1 Curtis, 1; Commonwealth v. Hawkins, 3 Gray, 463; People v. Rogers, 18 N. Y. 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points (Commonwealth v. Dorsey; 103 Mass. 412); and in well considered cases in courts of other States. Pirtle v. State, 9 Humph. 663; Haile v. State, 11 Humph. 154; Kelly v. Commonwealth, 1 Grant (Penn.), 484; Keenan v. Commonwealth, 44 Pa. St. 55; Jones v. Commonwealth, 75 Pa. St. 403; People v. Belencia, 21 Cal. 544; People v. Williams, 43 Cal. 344; State v. Johnson, 40 Conn. 136, and 41 Conn. 584; Pigman v. State, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, sec. 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in

such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." Compiled Laws of Utah of 1876, pp. 568, 569. The instruction requested by the defendant clearly and accurately stated the law applicable to the case; and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

One other error assigned presents a question of practice of such importance that it is proper to express an opinion upon it, in order to prevent a repetition of the error upon another trial. By the provisions of the Utah Code of Criminal Procedure, already referred to, the charge of the judge to the jury at the trial must be reduced to writing before it is given, unless the parties consent to its being given orally; and the written charges or instructions form part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal. The object of these provisions is to require all the instructions given by the judge to the jury to be reduced to writing and recorded, so that neither the jury, in deliberating upon the case, nor a court of error, upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury, which are not so reduced to writing and recorded, is error. Feriter v. State, 33 Indiana, 283; State v. Cooper, 45 Mo. 64; People v. Sanford, 43 Cal. 29: Gile v. People, 1 Col. 60; State v. Potter, 15 Kan. 302. The bill of exceptions shows that the presiding judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without the defendant's consent, to read from a printed book an instruction which was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine American Law Register, July, 1868, page 559;" and that to the instruction so given an exception was taken and allowed. This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed, and made part of the record, as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception. Merrill v. Nary, 10 Allen, 415.

For these reasons, the judgment must be reversed, and the case remanded with instructions to set aside the verdict and order a new trial.

PUBLIC OFFICER — RESIGNATION —ACCEPTANCE TO TAKE EFFECT WHEN.

STATE v. CLAYTON.

Supreme Court of Kansas, March Term, 1882.

The common law rule, that the resignation of a public officer is not complete until the proper authority accepts it, or does some thing equivalent thereto, obtains in this State. And where a probate judge forwarded his unconditional resignation to the Governor, and the Governor acknowledged its receipt and accepted the resignation to take effect upon the appointment of a successor: *Held*, that such resignation was not complete or the office vacant until such successor was appointed.

Original proceedings in *quo warranto*.

G. W. Nimocks, Maher & Osmond, for plaintiff; *Clayton & Clayton, Rossington, Johnston & Smith*, for defendant.

BREWER, J., delivered the opinion of the court:

This is an original case in this court, brought for the purpose of testing the title of defendant to the office of probate judge of Barton county. To the petition defendant has interposed a demurrer, and the case is now submitted to us upon such demurrer. The facts, as alleged in the petition and admitted by the demurrer, are as follows: In 1880 one E. L. Chapman was duly elected and qualified as probate judge of Barton county. On the 3d day of October, 1881, he wrote and forwarded to the Governor an unconditional resignation of such office. Such resignation reached the Governor's office on October 4, and the Governor's hands on October 8; and on the same day the Governor wrote to Judge Chapman: "Your resignation has just been received, and is hereby accepted and to take effect on appointment of your successor."

This letter was received by Judge Chapman on the 9th of October. About the first of November, 1881, the defendant was appointed by the Governor probate judge, and immediately qualified and entered upon the duties of the office. Prior to the November election of 1881, each of the three political parties in Barton county made a nomination for probate judge. The sheriff, in his proclamation of election, notified the electors that a probate judge was to be elected, and nearly every one who voted at that election voted for one or other of the candidates.

The relator received a majority of the votes cast at that election, received a certificate of election and qualified in due time. He then demanded possession of the office from the defendant, who refused to surrender, claiming that he was entitled to hold the office during the year 1882. Thereupon this action was commenced. The election in November, 1881, was held on the 8th day of November. Intermediate the 9th of October and the time defendant qualified and entered upon the duties of his office, Judge Chapman, as

probate judge, performed several official acts; but in affixing his signature, he did so in this form: "E. L. Chapman, acting probate judge." The relator had been, prior to the election, a justice of the peace, but did not act as such officer from and after the day of the election; and on the 24th day of November forwarded his resignation to the Governor, which resignation was accepted, and a successor appointed and duly qualified. The case therefore turns upon this question, when did the vacancy occur in the office by the resignation of Judge Chapman? Sec. 3, article 11, Constitution of the State, contains this language: "In case of vacancy in any judicial office, it shall be filled by appointment of the Governor until the next regular election, which shall occur more than thirty days after such vacancy shall have happened."

Section 12 reads: "All judicial officers shall hold their offices until their successors shall have qualified."

Now it is claimed by plaintiff that Judge Chapman's resignation took effect October 3d, because upon that day an absolute and unconditional resignation was by him transmitted to the Governor, the officer entitled to receive it; and this upon the theory that the incumbent of a public office has an absolute right to lay aside its duties and resign the office at any time, and that no acceptance is necessary. Plaintiff further contends that, if there be any doubt as to this, the resignation was complete and took effect on October 8, the day it was received and acknowledged by Governor. On the other hand, it is contended by the defendant that acceptance, or something equivalent thereto, is necessary to perfect a resignation; that a party who has once accepted an office and entered upon its duties has not the absolute right at its own pleasure to abandon its duties and resign the office; that the public are interested as well as the individual incumbent; and that, as acceptance, or its equivalent, is necessary to perfect a resignation, when the acceptance specifies the time at which it will take effect, until such time the resignation is not complete. The law, as stated by the defendant, is correct. The public have the right to command the services of any citizen in any official position which they may designate, and he may not, after entering upon the duties of the position, abandon them at his option. It is true that this as a practical question, will seldom arise and is of little moment, for in this country there are so many willing and eager to serve the public in official positions, that the difficulty always will be to find offices for the aspirants rather than to find incumbents for the offices. Still emergencies may arise in which the absolute and superior right of the public must be recognized. In times of peace the ranks of the army are supplied by voluntary enlistment, but in times of war and great national danger compulsory military service may be and has been required. So also service as a juror, which is a *quasi* office, is compulsory, and the individual citizen may not decline at his pleasure. So a party elected or appointed to any township office, who shall refuse or neglect to serve therein, unless unable from disease or other infirmity to discharge its duties, is liable to a fine of $25. Comp. Laws of 1879, p. 985, sec. 46. It is true there are some authorities in this country, which seem to recognize the absolute right of the office-holder to resign his office, and hold that the resignation is complete without acceptance. These authorities are collected by plaintiff in his brief, and are: United States v. Wright, 1 Mc'Lean, 509; People v. Porter, 6 Cal. 26; State, *ex rel.* v. Clark, 3 Nev. 566; State v. Fitts, 49 Ala. 402; Gates v. Delaware, 12 Iowa, 405; see, also, Bunting v. Willis, 27 Gratt. (Va.) 144. The opposite view is, however, recognized in other States, as will appear from the following authorities: Hoke v. Henderson, 4 Dev. L. (N. C.) 1; Van Orsdall v. Hazard, 3 Hill (N. Y.) 243; State v. Ferguson, 31 N. J. L. 107. In the case from North Carolina (*supra*), Chief Justice Ruffin, speaking for the court, said: "An officer may certainly resign, but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted, and that has been so much a matter of course with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are in our statute book several acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he can not lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer is discharged." See, also, the case of London v. Headen, 76 N. C. 72.

This question has recently been examined by the Supreme Court of the United States, in a case which arose in the State of Michigan (Edwards v. United States, 103 U. S. 471), in which the question is examined and authorities reviewed at some length by Mr. Justice Bradley and the conclusion of the court is unanimous that where the common law obtains, and in the absence of express statute, acceptance is necessary to perfect a resignation. In this case, citing the English authorities, he shows that the unquestioned rule of the common law was in accordance with the conclusion reached by the court. In our own State, by express statute (Comp. Laws 1879, p. 1013, sec. 3), the common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of this State." See, also, Railway Co. v. Nichols, 9 Kan. 252. So far as any special provisions of our statute are

concerned, they suggest no departure from the common-law doctrine, and are very like the provisions of the Michigan statutes which are referred to and considered by the Supreme Court of the United States in the opinion just cited. It follows from these considerations that the resignation forwarded by Judge Chapman did not take effect absolutely at the time it was forwarded, but required acceptance on the part of the Governor, and this acceptance being to take effect upon the appointment of a successor, the vacancy was not absolute until such appointment was made. The demurrer must therefore be sustained and judgment entered for the defendant.

All the justices concurring.

TRUSTS—LIFE TENANT AND REMAINDERMAN—INCOME OF CAPITAL.

VINTON'S APPEAL.

Supreme Court of Pennsylvania, February 20, 1882.

Shares of capital stock of an incorporated company were vested in a trustee to pay over all issues, profits and dividends to the *cestui que trust* for life, and after her death to transfer the shares to a third party named. Afterwards, the company having sold a portion of its purchase, divided the proceeds in the shape of a dividend of $50 upon each share, held that such dividend, being received by the trustee was properly a part of the capital of the estate, and not income accruing to the life-tenant.

Appeal of Sarah Vinton from a decree of the Common Pleas No. 3, of Philadelphia County, confirming the report of the auditor appointed to adjust the account of the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees for said Sarah Vinton, under a deed of trust.

The following facts were found by the report of the auditor: On May 19, 1856, James Martin executed a deed of trust by which he transferred to the Pennsylvania Company for Insurances on Lives and Granting Annuities one hundred shares of the capital stock of the St. Louis Gas-light Company in trust (*inter alia*) to pay over "all issues, profits and dividends accruing therefrom" to Sarah Vinton for her sole and separate use for life, and at her death to transfer said stock to Frederick Vinton or his legal representatives. The St. Louis Gas-light Company was incorporated by Act of the General Assembly of Missouri, approved February 3, 1837, which gave the company "the sole and exclusive privilege of vending gas-lights and gas-fittings in the city of St. Louis and its suburbs, to such persons or bodies corporate as may voluntarily choose to contract for the same," and also authority "to lay pipes, conduits, or rails at the expense of the company in any of the roads or in the avenues of the suburbs or in any of the streets or alleys of the city of St. Louis where the same may be required."

By an agreement dated January 8, 1841, the city of St. Louis granted to the St. Louis Gas-light Company, for and during the existence of their charter, the sole and exclusive privilege of lighting the streets, alleys, wharfs, public buildings, and other public places of the city of St. Louis, and of providing and furnishing the fittings, and materials of all kinds necessary." In 1857, the Laclede Gas-light Company was incorporated by the General Assembly of Missouri, with power to make and vend gas within all that portion of the city as established by Act of February 8, 1839, to lay down pipes, etc., and to have the sole and exclusive privilege and right of lighting the same. Meantime the city refused to pay its indebtedness for gas to the St. Louis Company, claiming that the contract of 1841 was illegal, and litigation began between the rival companies as to the exclusive right of lighting that portion of the city mentioned in the Laclede Company's charter; but by a tripartite agreement dated February 28, 1872, between the city, the St. Louis Company, and the Laclede Company, these differences were settled. The St. Louis Company agreed with the city, and with the Laclede Company, to abandon all claim of exclusive right to do business as a gas company in all parts of the city north of the southern line of Washington avenue (about one-third or half of the whole city); the Laclede Company agreed to abandon all claim of exclusive right in any portion of the city, and the city of St. Louis agreed to pay the bills for gas theretofore furnished by the St. Louis Gas Company. In consideration of this contract the Laclede Company further agreed to pay the St. Louis Company $650,000, and the latter company "sold and delivered to the Laclede Gas-light Company all its mains, pipes, connections, lamps, lamp-posts, brackets, meters, and all other of its property and effects which are situated and being within all that portion of the city of St. Louis north of the southern line of Washington avenue," and also surrendered to the Laclede Company its exclusive franchise within the territory named of making and selling gas therein. The property thus sold was originally paid for by the St. Louis Company partly from the capital stock of the company and partly out of its earnings.

On March 1, 1873, the Laclede Company executed its note for $650,000, payable to the St. Louis Company on or before May 1, 1873.

On April 23, 1873, the directors of the St. Louis Gas-light Company passed this resolution: "Ordered, that if the money to be paid by the Laclede Gas-light Company shall be paid by the 3d or 5th of May next, the president and secretary are directed to have a dividend of $600,000 entered on the books of the company, and to cause private circulars to be sent to the respective stockholders, informing them of the amount of

dividend then standing to their credit, and to pay the same on demand."

Accordingly, after the payment of the note, $50 per share was paid in accordance with this resolution, and the accountants received the sum of $4,995, the amount awarded to the 100 shares of stock held by them, which they paid over to the life-tenant, Mrs. Vinton.

The auditor found that in declaring dividends of profits the directors of the St. Louis Gas-light Company usually passed a resolution in the following form: "Resolved, that a dividend of $6 per share be declared out of the earnings of the company for the last six months, ending November 30, payable on and after the 15th day of December next."

Under this state of facts Frederick Vinton, the remainderman, claimed the $4,995 as a portion of the principal of the trust estate. The auditor (B. H. Haines) reported that the accountants be surcharged with the payment of this sum to Sarah Vinton.

The court, exceptions being filed, confirmed the report, whereupon the life-tenant took this appeal.

Geo. Junkin, for the appellant; *John G. Johnson* and *Edward Shippen*, for the appellee.

GORDON, J., delivered the opinion of the court:

The court below having ascertained, beyond doubt, that the money in controversy was derived, not from the annual earnings and accumulations of the St. Louis Gas Company, but from a sale of part of its franchise and permanent property, thought it ought of right to belong to the corpus of the trust estate, and thereupon refused to award it to the life tenant. If we are to follow our own decisions, as found in Earp's Appeal, 4 Ca. 368; Wiltbank's Appeal, 14 P. F. S. 256; Moss's Appeal, 2 Nor. 264; and Biddle's Appeal, the opinion of which was delivered by Mr. Justice Mercur but a few days ago (*ante*, p. 253), we must affirm the conclusion. All these cases are similar to the one in hand; a gift of the income of stocks for life to one person and the corpus over to another; and by all these we are instructed that in order to ascertain and settle the rights of these parties, we must endeavor to discover what is principal or capital as distinguished from earnings or dividends resulting from the use of capital.

More than this, following these authorities, we must go even further, and capitalize in favor of the remainderman the surplus profits which may have accumulated in the treasury of the corporation prior to the date of the creation of the trust. The present case, however, does not carry us to this extent, for the money in controversy comes from a sale of a part of the original franchise and property of the gas company; in fact, part of the very corpus represented by the stock shares which form the principal of the trust created by the deed of James Martin.

The charter of this company clothed it with powers and privileges not only very extensive, but very valuable. By this charter it had "the sole and exclusive privilege of vending gas-lights and gas-fittings in the city of St. Louis and its suburbs," and it was also empowered to "lay pipes, conduits, etc., in any of the roads and avenues of the suburbs, and in any of the streets and alleys of the city." Also, by indenture of the 8th of January, 1841, between the city and the company, the sole and exclusive privilege of lighting the streets, alleys, wharves, public buildings ond other public places of the city of St. Louis, and of providing and furnishing the fittings and materials of all kinds necessary for that purpose. The result of these grants and a careful use of them was great prosperity to the company, and a corresponding rise in its stock, But this very prosperity begat opposition and danger. The city refused to abide by its contract and to pay up its dues. Another company sprang up, the Laclede, which disputed the exclusive right of the old company to the territory mentioned in its charter. This led to the tripartite agreement of February 8, 1873, between the city of St. Louis, the Laclede Gas Company, and the St. Louis Gas Company, by which, among other things, the latter company agreed to withdraw from about one-third or one-half of its former territory in favor of the Laclede, and also to sell to it all its mains, pipes, connections, lamps, lamp-posts, brackets, meters, and all other of its property and effects situated and being within the territory from which it had agreed to withdraw.

In consideration of this sale and transfer the Laclede Company agreed to pay to the St. Louis Company the sum of $650,000. A dividend of $600,000 of this money was ordered by the directors, and of this $4,995 came into the hands of the Pennsylvania Company, as trustee of the one hundred shares of stock conveyed to it by the deed or power of attorney of James Martin. It is thus manifest that the money in dispute comes, not from the annual earnings of the company, but from a sale of part of its property; part of that very corpus which the stock shares represent, and without which those shares have neither substance or value. If, therefore, the life-tenant is entitled to this money, thus derived from the capital of this corporation, so, in the end, may she come to be entitled to the whole corpus of the trust. For the accomplishment of this result, it is only necessary that the St. Louis Gas Company should effect a sale of the balance of its property and order a distribution of the money so raised among its shareholders.

But, logically, the effect of such a doctrine is to defeat the whole object of the trust. Instead of securing for Mrs. Vinton a sure income for life, it gives her the principal to use at her pleasure, whilst the gift over to Frederick Vinton is wholly defeated.

A rule such as this, which may operate disastrously on a large and important class of our trusts, we can not agree to adopt. It is, indeed,

true, as said by Mr. Chief Justice Chapman in Minot v. Paine, 99 Mass. 101, that the rule which regards cash dividends, however large, as income, and stock dividends, however made, as capital, is a very simple and convenient one, and may relieve trustees and courts of much trouble; but it is certainly not one that commends itself for its justice and equity; neither does it at all regard the facts of a case like that of Earp's Appeal, or like the case in hand. To us it seems like a bungling rule of law that at one time would give what is indisputably income to the remainderman, and, at another, what is as clearly capital to the life-tenant. It is, however, enough for us that our own authorities repudiate such a rule. In the case last referred to, it was held that dividends from a corporate surplus fund accumulated before the testator's death, must be regarded as part of the stock forming the trust fund, whilst after accumulations, though distributed in the shape of stock, must be treated as income, and go to the life-tenant. In like manner, it was held in Wiltbank's Appeal, that the earnings or profits of the stock of a decedent, made after his death, were income, though put into the form of capital by the issue of new stock, and it was there said that: "Equity, seeking the substance of things, found that the new stock was but a product, and was, therefore, income." So may we say in this case. Equity seeking not mere convenience but the substance of things, finds the dividend in controversy to be part of the actual capital of the company's money, raised by a sale of part of its original franchise and realty; that which is stock most specifically and directly represents; hence, it awards the product to him in whom the stock is finally to vest.

Assume the contrary doctrine, and that which we have already pointed out may at any time occur; on a sale of the entire franchise and property of the Gas Company, with a like order by its directors for the distribution of the money so raised, the dividends must go, regardless of the equities of the parties, to the life-tenant, and nothing whatever be left for the remainderman. This might be very convenient for trustees and courts; for, as it would definitely close out the trust, there would be no further trouble about it; nevertheless, the justice of such a disposition of the trust would be more than doubtful. Again, this same doctrine, which makes a cash dividend income, and a stock dividend capital, would often work with equal harshness upon the interests of the life-tenant. For corporate earnings might be retained for an indefinite length of time, and then be distributed in the shape of stock shares, which the rule contended for would at once pronounce to be capital, and thus would the beneficiary be deprived of his or her income.

Than this, far better is our Pennsylvania doctrine, admirably stated by our brother, Mr. Justice Paxson, in Moss's Appeal, as follows: "But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction.

"Equity, which disregards the form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."

Decree affirmed, with costs.

SHARSWOOD, C. J., PAXSON and TRUNKEY, JJ., dissent.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

27. Will a part payment of a debt, made on Sunday, be sufficient to take the debt out of the operation of the statute of limitations? E. G.
Boston, Mass.

28. A sues B in a justice's court, and obtains judgment on his own testimony. B pays up the judgment, and subsequently finds out that A obtained the judgment through perjury. Has B any remedy? What is his remedy? Z. L.
Sheboygan, Wis.

29. Are war claims negotiable? The right to land or the right to pension which a soldier is given by the U. S. Laws? The best work on war claims? W. W R
Jackson, Mich.

30. The plaintiff, after filing his complaint, abandons his action, in that he pays no further attention to it, and is not present on the day of the trial, nor in any way represented. Has the court jurisdiction, upon the filing of an answer by the defendant, which is substantially a general denial, to enter into trial of the merits and render a judgment against the plaintiff which will bar a subsequent action for the same cause? C.
Valparaiso, Ind.

31. The lien for State, etc., purposes, and the lien of municipal corporations for taxes in Indiana—is the same except that of municipal corporations "shall have the same effect as a judgment of a court of general jurisdiction? Supposing taxes are assessed by both authorities, which becomes a lien at the same date upon certain real estate, does a sale for State, etc., purposes, made before a sale for city purposes, exhaust the property or otherwise relieve it from the burden of city taxes? Does a sale for State, etc., purposes relieve the property of the lien of previously assessed city taxes? I can find no authority except 4 Cent. L. J. 296.
Logansport, Ind.

32. Is the common law in force in the District of Columbia? Are the laws of Maryland in force in the District of Columbia? Are the laws, judiciary system and government of the District of Columbia Federal?
St. Louis, Mo. A. F. F.

33. Under the laws of Oregon, the mortgagee of a chattel mortgage has but a lien upon the property, and can not acquire any title until foreclosure and sale. Feb. 1, 1880, A gives a mortgage on mare with foal, but foal is not mentioned. Colt is foaled May 1, 1880. Debt secured, but not due until September, 1880. Can mortgagee subject the colt to payment of mortgage debt? In other words, does the mortgage attach to the colt? W.
Portland, Oregon.

34. In this State, a simple deed in common form, executed by a tenant in tail, will bar the entail and all reversions and remainders expectant thereon. A, a tenant in tail, makes an agreement to convey, upon a certain date, land held by him in tail, to B, and is paid the full value thereof. There is no doubt but that B might have maintained a bill for specific performance against A, but can he maintain such a bill against the issue; or, there being no issue against the revisioner. or remainderman, on the ground that equity will consider that as done which ought to be done? Or, what can B do in the matter? E. G.
Boston, Mass.

QUERIES ANSWERED.

Query 4. [14 Cent. L. J. 58.] *a*. A citizen of Missouri, owning in fee and occupying as a homestead in this State, a tract of 240 acres, died in 1874, while the homestead law of 1865 was in force. He left a widow, but no children or their descendants. By his last will after providing for the payment of his debts, he provides as follows: "It is my will that my wife Sarah have all the remainder of my property, both real and personal, to use and dispose of as she pleases until her death, and then the remainder to go to my next legal heirs." She died in a few days after he died, knowing the contents of the will and supposing that it passed a fee-simple title in all the land to her. By her last will she devises the 160 acres of the tract on which the house stood to certain parties, and the remaining 80 acres (which corners with the 160 acres) to certain other parties. Her devisees, after her death, had both wills probated and respectively instituted suits in ejectment against the representative of the husband's heirs, who was in possession and was defested. The suits were based on the theory that the husband's will vested a fee-simple title in his wife. First. Did the will vest title in wife in fee, or only a life estate, with a power of disposing of it in fee? *b*. If the latter, was a conveyance by will a proper execution of the power? *c*. If her interest under the will terminated at her death, had she any interest in fee under the homestead law? *d*. Where is the title?
Paris, Mo. T. B. R.

Answer. 1. The will gave the wife a life estate. 2. She had no power of disposition of the fee. 3. If she had a power over the fee, it was not correctly executed, and her will passed no title. 4. The title is in the "next legal heirs." I am not acquainted with the homestead laws of Missouri, therefore can not answer that branch of the inquiry. In support of above answer the authorities are quite numerous and unbroken. The best case is that of Brant v. Virginia Iron & Coal Co, 3 Otto, 262; See, also, 47 N. Y., 512; 100 Mass., 470. A very strong case is Smith v. Bell, 5 Pet. 77. A vast number of others might be cited, but these, with the authorities given in them, will put the inquirer upon the right track. O. T. Bowz.
Indianapolis, Ind.

Query 12. [14 Cent. L. J. 179.] A promissory note is executed and delivered in the following language: Feb. 22, 1881. $375. One day after date I promise to pay A B, or order, the sum of three hundred and seventy-five dollars, with ten per cent. interest (10 per cent.) from date until paid, for value received. Signed, C D;" to which the following is added: "I hereby agree that this note may be paid in installments, provided all of it be paid within two years. Signed, A B." *Quære*: When does this note fall due? Should it be held that this *addenda* has the effect to change the time as to the maturity? Will that fact be affected by the non-payment of any installments? Was there any other consideration for the agreement, than that the installments should be paid, when, in fact, the agreement was merely for the accommodation of the maker?
Denver, Col. J. M. E.

Answer. From the language of said note it is reasonable to infer from the most critical interpretation of it, that the intention of said parties was more to fix the amount of interest as a definite thing, than the time when said note would mature. The first promise was to pay one day from date at ten per cent., then the repetition of ten per cent. from date until paid, is conclusive evidence that the promise to pay one day from date was more intended by both parties to determine the rate of interest than the time for payment of the principal. The above being the natural inference, the note could not be considered due as long as the maker was willing to pay the ten per cent. Such a note as the above, less the *addenda*, would be quite ambiguous enough to admit of parol evidence to show the intentions of said parties to said note. Hence the *addenda* by the holder of said note that, if it is paid within two years, it might be paid in instalments, confirms my theory that the unqualified, simple note was inadequate to determine the intention of said parties as to the time of the said note's maturity Hence the *addenda* settles the doubtful point as to the precise time of said note's maturity, and removes all ambiguity contained in the former part of said note as regards their intentions; and, as there is no time set when an instalment shall be paid, the maker may elect to pay the whole at any time within the said two years, or accommodate himself by paying any part, or number of parts, at any time, or number of times, so long as the whole amount is paid within the said two years, when said note will mature and become actionable. T. H. Girard.
Grand Rapids, Mich.

Query 14. [14 Cent. L. J. 179.] A obtained a judgment against B before a justice of the peace. The return shows that personal service was had, but the fact is that B was not within the State, and not served; C was garnished under execution issued on this judgment, and answered that he owed B, but that the debt was not due. Cause continued until debt matures, and is now pending. The judgment being void as to B, what is his remedy? This in Missouri. A. H. K.
Kansas City. Mo.

Answer 1. See 1 High on Injunction, sec. 229. Second ed. Wm. H. H.
Wheeling, Va.

Answer 2. The fact of said judgment being irregularly obtained for the want of personal service, makes the judgment void *ab initio*, and all subsequent steps toward the collection of the same are illegal. The

garnishee can not contest the validity of said judgment, but must, as soon as the debt is due B, pay the sum into court in satisfaction of said judgment. Then if B does not, in a reasonable time, attempt to recover said amount of money paid into court by said garnishee in satisfaction of said judgment, the law will presume all proceedings regular and valid. The justice is not liable, as he has a right, of course, to presume the return of his process regular as it is made to appear by said officer. The jurisdiction of said justice depends upon a proper service of his writs, and the officer causing the jurisdiction to appear regular by his false return, is the only wrong-doer in the whole proceedings, and is alone liable to the said defendant in an action on the bond for a breach of the conditions obligatory, or in a penal action for making said false return, or in a civil action for the recovery of said sum upon the common courts for money had and received to his use. T. H. G.

Grand Rapids, Mich

Answer 3. When the return of a sheriff or constable to a process is regular upon its face, it is conclusive upon the parties to the suit, and can not be impeached collaterally. The party injured has his remedy against the officer, if his return is false. Hallowell v. Page, 24 Mo. 590; Delener v. Higgins, 26 Mo. 180; McDonald v. Leewright, 31 Mo. 29; Stewart v. Stringer, 41 Mo. 400; Reeves v. Reeves, 33 Mo. 28; Jeffries v. Wright, 51 Mo. 215. Or an injunction upon a proper showing would lie in this case. High on Injunctions, sec. 89; Patterson v. Brock, 14 Mo. 473; Duncan v. Gibson, 45 Mo. 352; Davis v. Staples, 45 Mo. 567; George v. Tutt, 36 Mo. 141; Stockton v. Parson, 60 Mo. 535; Sauer v. City of Kansas, 69 Mo. 46. ALBERT YOUNG.

Kansas City, Mo.

Query 15. [14 Cent. L J. 179.] The statute of Maine provides that "whoever travels on or does any work, labor or business on the Lord's day, except works of necessity or charity, shall be punished by fine not exceeding ten dollars." Query: Whether one having attended church on the Lord's day, and after church, going out of his way to mail a letter, is injured by snow or ice falling from a building owned by the city, situate upon a street can recover damages for injuries? K.

Portland, Me.

Answer, No. 1. The case of Davis v. City of Somerville, 128 Mass. 594, is directly in point. They there decide that the plaintiff can not maintain an action for the injuries received. The authorities are reviewed in that case. E. G.

Boston, Mass.

Answer No. 2. It has long been settled that a penalty annexed to an act by statute, implies a prohibition and renders the act illegal. Bartlett v. Vinor, Carthew, 252; 1 Binney, 120; 34 Maine, 500; 3 Cush. 449-450.—Shaw, C. J. It is necessary for a plaintiff, in actions of this kind, to prove that he comes within the exception under the statute—that he was lawfully traveling upon the day and at the time when he was injured. Hinckley v. Penobscot, 42 Maine, 89; Stanton v. Met. R. Co., 14 Allen, 489, in which 26 Penn. 342, *contra*, is cited. Mailing a letter can not be considered except, possibly, in very rare cases, as coming within the exception; and as the object in going that way was unlawful, it does not appear how the plaintiff can recover. J. F. N.

Pittsfield, Mass.

WEEKLY DIGEST OF RECENT CASES.

APPEAL—ORDER DISBARRING ATTORNEY A FINAL ORDER.

An order of the circuit court forever disbarring an attorney, and prohibiting him from practicing law in the courts of this State, *held*, appealable under subdivision 2, sec. 3069, Rev. Stats., as a final order affecting a substantial right made in special proceedings. *In re Orton*, S. C. Wis., March 14, 1882.

ARMY OFFICERS — RETIRED LIST—INCREASED PAY.

1. Army officers retired from active service with reduced pay are still in the service, and are entitled to the increased pay which the law allows for every five years' service while in that condition, as well as when in active service. 2. The ten per centum increase of pay which the statute allows for every period of five years is to be computed on the sum primarily fixed as salary per annum, with the increase for each five years previously earned added to that sum, when its increase for any new period of five years is to be computed. *United States v. Tyler*, U. S. S. C., October Term, 1881.

ATTORNEY AND CLIENT — PROCEEDINGS TO DISBAR —REQUISITES OF RECORD—PRACTICE.

Where the proceeding to disbar an attorney is by order to show cause, the charges against him should clearly appear in the order itself, or in some instrument appended thereto, or (at least) on file; and even when the charges are to be supported by pleadings filed by such attorney, the charges themselves should be distinctly specified. The circuit court may properly, on its own motion, require an attorney to show cause why he should not be disbarred, when pleadings filed by him appear to require an investigation of that character. *In re Orton*, S. C. Wis., March 14, 1882.

BANKRUPTCY—ATTACHMENT—RIGHTS OF ATTACHING CREDITOR.

Every title to property sought to be acquired by a seizure and sale under an attachment, belonging to one subsequently declared a bankrupt, is defeated if the attachment is levied within four months next preceding the institution of the bankruptcy proceeding; and the creditor, at whose instance and for whose benefit the sale has been made, and the purchaser who has acquired possession of the property, asserting a claim of ownership, are each liable for a tortious conversion of the property of the assignee. *Conner v. Long*, U. S. S. C., October Term, 1881.

COMMON CARRIER — NEGLIGENCE — ADDITIONAL PRECAUTIONS.

Although the carriage of cotton on open cars may not be of itself conclusive of negligence, yet such transportation imposes upon the carrier the duty of adopting such additional precautions as safety may require. *North American Ins. Co. v. St. Louis, etc. R. Co.*, U. S. C. C., E. D. Mo., January 10, 1882.

CORPORATIONS—OFFICERS OF—PERSONAL CAPACITY.

Where a party sells stock of certain corporations and remits the proceeds to another, who is treasurer of the corporations, and who out of it buys land for the corporations, the latter receives it in his capacity of treasurer, and not as a private transaction. Where money which is due for subscriptions to stock is sent to the treasurer of the

corporation, who does not issue the stock, the remedy is against the corporation to compel the issue of the stock and not against the treasurer personally to recover the money. *Loring v Frue*, U. S. S. C., October Term, 1881.

CRIMINAL LAW—BLACKMAIL—THREATENED PROSECUTION.

A threat to prosecute for an alleged or supposed offense connected with the creation of a debt, where the object of the threat is merely to secure the payment of the debt due from the person threatened to the person making the threat, does not come within the spirit or purpose of the statute. *State v. Hammond*, S. C. Ind., April 1, 1881.

DAMAGES—INJURIES TO THE PERSON AND TO PERSONAL PROPTERTY.

In actions for personal injuries and for damages to personalty, while interest *eo nomine* is not to be computed as a matter of right, yet the jury may in their discretion, when fixing the amount of damages, considered the length of time for which they may have been withheld, the character of the tort, and all other circumstances connected with the whole transaction, in order to arrive at the proper sum to be assessed. *W——, etc. R. Co. v. McCauley*, S. C. Ga., March 28, 1882.

EQUITY—DENIALS IN ANSWER—WEIGHT OF EVIDENCE.

A bill in equity dismissed because the denials of the answer responsive thereto were not overcome by the testmony of two witnesses, or of one witness corroborated by circumstances. *Vigel v. Hopp*, U. S. S. C., October Term, 1881.

FEDERAL COURT—JURISDICTION—ASSIGNED CONTRACT.

A judgment founded on a contract, is a contract within the meaning of the first section of the act of March 3, 1875, and the assignee of such a judgment can not sue on it in a Federal court, unless his assignor could also have sued on it. *Walker v. Powers*, U. S. S. C., October Term, 1881.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF PARTIES.

Where various parties transferred negotiable securities to a non-resident in order to give him the power to sue in the Federal court, and the court below entered a judgment in favor of the non-resident for those owned by him, and against him for those colorably transferred to him, this court reversed the judgment, and remanded the case with instructions to dismiss it, holding that, under the act of 1875, it was the duty of the lower court to dismiss the case on its own motion, irrespective of the state of the pleadings, as soon as such collusion to confer jurisdiction on it appeared. *Williams v. Township of Nottawa*, U. S. S. C., October Term, 1881.

GARNISHMENT—ADMINISTRATOR NOT SUBJECT TO, BEFORE FINAL ORDER OF DISTRIBUTION.

An executor or administrator is not subject to garnishment before a final order for the distribution of the estate is made; and where he is summoned as garnishee before the making of such order judgment can not be taken against him therein after the order is made. Whether he is subject to garnishment after such final order is not here determined. *Case Threshing Machine Co. v. Miracle*, S. C. Wis., February 7, 1882.

HUSBAND AND WIFE—PARENT AND CHILD—CUSTODY OF MINOR WIFE.

It is true that the parent is entitled to the custody and service of a child during minority; and so, too, is the husband entitled to the custody and service of his wife; yet, whenever a dispute arises between the parent and the husband as to the custody of the minor wife, and the aid of the law is invoked by writ of *habeas corpus*, it becomes the duty of the court, on hearing all the facts, to exercise its discretion, and determine as to whom the custody of such minor shall be given. And in such cases it must be a flagrant abuse of discretion which will authorize a reviewing court to interfere. The custody was in this case awarded to the husband, and we find no abuse of discretion in the action of the court below. *Gibbs v. Brown*, S. C. Ga., March 28, 1882.

JUDGMENT—SALE UNDER—SATISFACTION OF.

A party who obtains a judgment, and, by proceedings based thereon, forces a sale of property of the debtor, and bids it in, paying therefor the full amount of the judgment, thereby satisfies the judgment, and has no interest by virtue of such judgment in demanding an administration of the debtor's assets. *Walker v. Powers*, U. S. S. C., October Term, 1881.

JURY TRIAL—INSTRUCTION—ASSUMING FACTS NOT PROVEN.

An instruction which assumed that a note had been extinguished by rents collected, when there was no proof that a sufficient amount had been collected: *Held*, erroneous, and the case reversed and remanded for a new trial. *Jones v. Randolph*, U. S. S. C., October Term, 1881.

LAND OFFICE — PRACTICE — REGISTER AND RECEIVER.

1. Where the register and receiver of the land office refused to receive any proofs or money from an applicant on the ground that his application was too late, it was unnecessary in him to offer to prove citizenship or the other facts required. 2. Inasmuch as the lands in controversy were not subject to private entry, and were part of a grant to a railroad company, sec. 2264 of the U. S. Rev Stats. does not apply, but the case is governed by sec. 2 of the act of Congress of July 14, 1870, relating to settlers on lands reserved for railroad purposes. *Morrison v. Stalnaker*, U. S. S. C., October Term, 1881.

LIBEL — PRIVILEGED COMMUNICATIONS — DISTINCTION BETWEEN PUBLIC AND PRIVATE AFFAIRS.

In discussing the subject of a scheme or plan for making a railroad by the consolidation of certain short lines, and to obtain control of a certain railroad company by electing directors favorable to the scheme, a public speaker or writer has the qualified privilege which attaches to public affairs. The distinction between the public and private affairs of a railroad is this: When a railroad is to be built, or a company to be chartered, the question whether it shall be authorized is a public one; but when the company is organized and the stock issued, anything which merely affects the value of the stock is private. *Crane v. Waters*, U. S. C. C., D. Mass., February 23, 1882.

LIMITATIONS — DEMANDS AGAINST THE GOVERNMENT.

The right of the owner of the land to recover the money arising from its sale and held by the government as trustee for him, did not become a claim on which suit could be brought, until demand at the treasury; and hence suit therefor, if brought within six years after such demand, is not barred by section 1069 of the U. S. Revised Statutes, although brought more than six years